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December 8, 2004

Honorable Pat Miller, Chairman
Tennessee Regulatory Authority
ATTN: Sharla Dillon, Dockets
460 James Robertson Parkway
Nashville, TN 37243-5015

Re: Petition of Frontier Telecommunications, Inc. for Declaratory Ruling; Docket No. 04-00379

Dear Chairman Miller:

Enclosed please find the original and 14 copies of the Answer and Motion to Dismiss of Ben Lomand Rural Telephone Cooperative, Inc. in the above-referenced matter. Please return a date stamped copy of the pleading.

Thank you for your assistance. If you have questions, please do not hesitate to contact me.

Sincerely,



H. LaDon Baltimore
Attorney for Ben Lomand Telephone
Cooperative, Inc.

LDB/dcg
Enclosures
cc Guilford Thornton, Jr., Esq.

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

**PETITION OF FRONTIER
COMMUNICATIONS, INC.
FOR DECLARATORY RULING**

) '04 DEC 8 PM 1 54
)
) TN REGULATORY AUTHORITY
) DOCKET ROOM
) **DOCKET NO 04-00379**

**ANSWER AND MOTION TO DISMISS OF
BEN LOMAND RURAL TELEPHONE COOPERATIVE, INC.**

Ben Lomand Rural Telephone Cooperative, Inc. ("Ben Lomand Co-Op"), by and through its undersigned counsel, files this answer and motion to dismiss to the petition of Frontier Communications, Inc. ("Frontier") in this matter. Ben Lomand Co-Op objects to Frontier's petition as being without justification, either procedurally, substantively, or jurisdictionally. Ben Lomand Co-Op requests that the Tennessee Regulatory Authority ("TRA" or "Authority") dismiss the petition without convening a contested test. In support of its answer and motion to dismiss, Ben Lomand Co-Op states as follows:

I. ANSWER

1. In paragraph 1, Frontier, formerly known as Citizens Telecom, makes comments regarding its corporate structure and authorization to operate in Tennessee. Ben Lomand Co-Op accepts the statements Frontier makes regarding itself as true.

2. In paragraph 2, Frontier makes statements regarding its corporate structure and authorization in Tennessee. Ben Lomand Co-Op accepts the statements Frontier makes regarding itself as true.

3. Ben Lomand Co-Op admits that it is a telephone cooperative as defined in T.C.A. §65-29-102 and serves customers in the Tennessee counties of White, Warren, Van Buren, Grundy, and portions of Franklin, Coffee, and Bedford. Ben Lomand Co-Op also admits that it is unregulated by the TRA pursuant to T.C.A. §65-29-130. To the extent paragraph 3 may be considered to contain any allegations, Ben Lomand Co-Op denies the allegations.

4 Ben Lomand Co-Op admits it also owns Ben Lomand Communications, Inc. ("BLC") a CLEC, and competes with Frontier in McMinnville and Sparta, Tennessee. Ben Lomand Co-Op also admits that it owns 50% of Volunteer First Services, Inc. which was recently certificated by the Authority to operate as a CLEC in Crossville, Tennessee, another market served by Frontier (TRA Docket No. 03-0067). To the extent paragraph 4 may be considered to contain any allegations, Ben Lomand Co-Op denies the allegations.

5. Ben Lomand Co-Op admits that the TRA has declaratory ruling authority, but strenuously denies that it has such authority in this matter. Ben Lomand Co-Op is not a public utility regulated by the Authority; it is a telephone cooperative under T.C.A. §§65-29-101, *et seq.* In fact, T.C.A. §65-4-101(6)(E) specifically excludes cooperative organizations, associations, or corporations from the definition of "public utility." Ben Lomand Co-Op is a cooperative as defined by T.C.A. §65-29-102. T.C.A. §65-29-130 severely limits the jurisdiction of the Authority over cooperatives. Such jurisdiction over cooperatives is confined to settling disputes of territorial boundaries. A "boundary" is defined as anything indicating a line or confine.¹ Territorial boundaries are not at issue here, the issue is not where the boundaries of Frontier and

¹ Funk & Wagnall's Standard Desk Dictionary, 1984 (Harper & Row Publishers, Inc)

Ben Lomand Co-Op are located, but the very essence of statutory framework and legislative policy providing for the establishment and operation of cooperatives. Disputes over territorial boundaries involve the encroachment or non-encroachment of boundary lines of cooperatives and other telecommunication services providers. Therefore, because the Authority lacks subject matter and personal jurisdiction and Frontier fails to state a claim upon which relief can be granted, Ben Lomand Co-Op denies that the Authority has jurisdiction to grant the relief requested as cited by Frontier in paragraph 5. Therefore, this petition must be dismissed.

To illustrate the lack of jurisdiction in this matter, attached hereto as Exhibit 1, is a letter from Mr. Val Sanford, Esq. to Mr. Paul Allen, the then Executive Director of the Tennessee Public Service Commission, predecessor to the TRA, in which is stated that "this Commission has no jurisdiction to grant authority to operate in the territory of telephone cooperatives."² The parties to that matter and the Commission accepted this as an accurate statement of the issue then, and it continues to be true today.

6. Ben Lomand Co-Op admits that it has taken the position that Frontier is statutorily prohibited from competing in Ben Lomand Co-Op's territory. Ben Lomand Co-Op hereby adopts paragraph 5 of this answer as if set forth in its entirety herein.

7. Ben Lomand Co-Op admits that an interconnection agreement was entered into between Frontier and Ben Lomand Co-Op as set forth in paragraph 7 of Frontier's petition. To the extent paragraph 7 may be considered to contain allegations, Ben Lomand Co-Op denies the allegations.

² Letter of Valerius Sanford, Esq. to Paul Allen, June 21, 1995, page 1.

(a) Ben Lomand Co-Op denies all allegations and legal conclusions stated by Frontier in its second paragraph no. 7 on page 3 of its petition. Frontier makes unsubstantiated conclusionary arguments that Frontier is able to compete in Ben Lomand Co-Op's territory. Ben Lomand Co-Op admits that the Authority has approved the interconnection agreement, but adamantly denies that any "final order by regulatory body or court with the requisite jurisdiction" has ruled that Frontier may offer "local exchange and local exchange access services in the geographic areas to which this agreement (interconnection agreement) applies "

8. Ben Lomand Co-Op admits that, by virtue of Frontier's filing of this petition, controversy exists between Frontier and Ben Lomand Co-Op regarding the matter at issue in this docket. To the extent paragraph 8 may be considered to contain allegations, Ben Lomand Co-Op denies the allegations.

9. Ben Lomand Co-Op adamantly denies that approval of Frontier's petition is warranted. See paragraph 5 of this answer. Ben Lomand Co-Op hereby adopts paragraph 5 of this answer as if set forth in its entirety herein.

(a) Ben Lomand Co-Op denies that T.C.A. §65-4-201 has any impact in permitting Frontier to operate in Ben Lomand Co-Op's territory.

(b) Ben Lomand Co-Op adamantly and vigorously denies that the preemption of T.C.A. §65-29-102 is preempted and prohibited by 47 U.S.C. §253(a). Ben Lomand Co-Op admits that the FCC has ruled that T.C.A. §65-4-201(d) is unenforceable as an unlawful prohibition against competition, but such statute has no relevance to cooperatives. As set forth above, Ben Lomand Co-Op and other cooperatives are specifically exempted from TRA jurisdiction and subject matter except for the limited jurisdiction allowed in T.C.A. §65-29-130.

No court of competent jurisdiction nor any regulatory agency has ruled that the provisions of T.C.A. §65-29-130 extend beyond disputes of territorial boundaries, nor that cooperatives may not be excluded from the definition of public utility contained in T.C.A. §65-4-101. See paragraph 5 of this answer. Ben Lomand Co-Op hereby adopts paragraph 5 of this answer as if set forth in its entirety herein. In order for either T.C.A. §65-4-101 or T.C.A. §65-29-130 to be voided, it will take a court of competent jurisdiction or the Federal Communications Commission. The TRA does not have the jurisdiction to preempt and/or void Tennessee statutes.

(c) In paragraph 9(c) of the petition, Frontier quotes from T.C.A. §65-29-130(a). The statute speaks for itself and no response is required from Ben Lomand Co-Op. To the extent this paragraph may be considered to contain allegations, Ben Lomand Co-Op denies the allegations.

(d) In paragraph 9(d) of its petition, Frontier cites T.C.A. §65-4-123 regarding the public policy intent of the Tennessee General Assembly. Frontier then proceeds to make unsubstantiated and conclusionary legal arguments about such statute and its granting Frontier the ability to compete in a cooperative territory. Such statute does not authorize Frontier to provide telecommunication services in the territory of Ben Lomand Co-Op. Therefore, Ben Lomand Co-Op moves that the allegation be stricken since it fails to state a cause of action and because it fails to state a claim on which relief can be granted.

In addition, the intent of the legislature to continue the exemption of cooperatives from the jurisdiction of the TRA except as set forth in T.C.A. §65-29-130 is retained after the passage of the Tennessee Telecommunications Act of 1995 (Public Chapter 305 of the Acts of 1995), of which T.C.A. §65-4-123 is a part.

This general statement of law did not repeal or supersede the specific laws pertaining to telephone cooperatives as set forth by the exclusion of cooperative organizations from the definition of "public utility" in T.C.A. §65-4-101(a)(6) nor the specific chapter pertaining to telephone cooperatives, Chapter 29, which includes T.C.A. §65-29-130 which limits the Authority's jurisdiction over telephone cooperatives. It is a well-established principle of law that a specific statute supercedes a generic statute. Attached hereto as Exhibit 2 is a letter from one of the drafters of the Tennessee Telecommunications Act of 1995, Val Sanford. In the letter to the House Majority Leader, Mr. Sanford specifically states that with this new act "co-ops would continue to be excluded." ³

II. AFFIRMATIVE DEFENSES AND MOTION TO DISMISS

Pursuant to Tenn. Rules Civ P. 8.03 and TRA Rules 1220-1-2.03(2) and (3), Ben Lomand Co-Op has included in the above answer to the petition motions raising the following defenses:

10. In paragraphs 5, 6, 7, 8, and 9 of Ben Lomand Co-Op's answer to the petition, Ben Lomand Co-Op moves to dismiss the allegations on the grounds that the TRA lacks jurisdiction over the subject matter.

11. In paragraphs 5, 6, 7, 8, and 9 of Ben Lomand Co-Op's answer to the petition, Ben Lomand Co-Op moves to dismiss the allegations on the grounds that the TRA lacks personal jurisdiction over Ben Lomand Co-Op.

³ Letter from Valerius Sanford, Esq. to the Hon. Bill Purcell, Majority Leader, May 15, 1995, p 2

12. In paragraphs 5, 6, 7, 8, and 9 of Ben Lomand Co-Op's answer to the petition, Ben Lomand Co-Op moves to dismiss the allegations on the grounds that the petition fails to state a claim upon which relief can be granted.

III. REQUEST FOR RELIEF

WHEREFORE, Ben Lomand Co-Op respectfully requests that the TRA:

- 1 Dismiss the petition filed by Frontier and decline to convene a contested case;
2. Grant such other and further relief to which Ben Lomand Co-Op may be entitled

Respectfully submitted,



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Certificate of Service

The undersigned hereby certifies that on this the 8th day of December, 2004, a true and correct copy of the foregoing has been forwarded via first class U S. Mail, hand delivery, overnight delivery, or facsimile transmission to the following.

Guilford F. Thoronton, Jr., Esq.
Stokes, Bartholomew, Evans & Petree
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Nashville, TN 37219



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